

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 99-254

January 28, 2000

NORTHERN UTILITIES, INC.
Petition for Waivers From
Chapter 820

ORDER FURTHER
AMENDING TEMPORARY
PROTECTIVE ORDER No. 1

I. SUMMARY

This Order Further Amending Temporary Protective Order No. 1 in the above-captioned matter is issued in response to the appeals of Northern Utilities, Inc. and the Plumbing and Heating Contractors (PHCC) of the Examiner's January 11, 2000 Order on PHCC's Motion for Access to Information Designated as Confidential. The January 11, 2000 order allowed counsel for PHCC as well as PHCC's consultant access to confidential information. However, based on PHCC's counsel's disclosure of a financial interest in a company with a division that sells heating oil, the Order restricted PHCC's counsel from investing in an entity that provides the services at issue in this case for a period of three years. Based on written information provided by counsel for PHCC in response to Northern's appeal and on the basis of the discussion with counsel for Northern, PHCC and the Public Advocate at a telephone conference of counsel held on January 20, 2000, the Examiner further amends Temporary Protective Order No. 1 by removing the 3-year restriction on PHCC's counsel's investment in any venture that provides the services at issue in this proceeding and adding a requirement for PHCC's counsel to file notice to the Commission and parties in this case if he makes any direct investment in ventures that provide the services at issue in this proceeding. The reasons for this further amendment follow.

II. DISCUSSION

Northern argued in its appeal that more information is needed concerning Mr. Bradley's interest in Spring Ice and Oil a division of Vessel Services, Inc. (VSI) in which Mr. Bradley owns an interest. Northern also objected to the portion of the order allowing PHCC's consultant access to confidential information. PHCC appealed the investment restriction in the January 11, 2000 Order.

In his January 18, 2000 filing and at the conference of counsel, Mr. Bradley, counsel for PHCC, provided additional information about Spring Ice and Oil. Although Mr. Bradley characterizes his investment in VSI as a substantial financial interest, he asserts that Spring Ice and Oil is an insignificant part of VSI. The purpose of Spring Ice and Oil, according to Mr. Bradley, is to maintain employment for employees of VSI who are needed by VSI during its peak season in the summer. Additionally, the heating oil business operates at a loss. Finally, Mr. Bradley represented that VSI has no interest in expanding Spring Ice and Oil. Further, Spring Ice and Oil does not provide any

services at issue in this case and does not have any contract with a business providing such services. Tr.-D17. Although Mr. Bradley disagreed with the divestiture requirement, he did not oppose a requirement to provide notice to the Commission and the parties if he made any direct investment in any of the services at issue in this proceeding or if VSI expanded to provide such services.

Based on the above information, the Examiner concludes that Mr. Bradley does not have a “direct, personal and substantial financial interest that could be benefited by access to the information to the detriment of the party that provided the information.” 35-A M.R.S.A. § 1311-A (1)(D)(2). Although Mr. Bradley’s interest in VSI is substantial, according to Mr. Bradley’s own description of the interest, the heating oil division of VSI represents a very small part of the parent company, and this small (and unprofitable) division does not provide the services at issue in this case and has no plans to do so. In addition, Spring Ice and Oil has no contracts or other arrangements to provide such services to its heating oil customers through a third party. These facts indicate that Mr. Bradley does not have a substantial interest in a business that does or is likely to compete with Northern’s services that are at issue in this case.¹ Therefore, no restrictions other than those generally applicable to recipients of confidential information are warranted. See 35-A M.R.S.A. § 1311-A (1)(D).

However, counsel for PHCC has agreed to provide notice to the Commission and the parties if he makes any direct investment in a venture that provides services at issue in this case or if a venture in which he has a direct investment offers the services at issue in this case. This agreed-to disclosure requirement should provide Northern with additional assurance that the Protective Order, Protective Agreement and the Bar Rules supply ample protection against unauthorized use of the confidential information by counsel for PHCC.

This Order does not modify the provisions granting PHCC’s consultant access to confidential information. Northern argues that consultants are not subject to the same restrictions that will protect against disclosure as are attorneys. However, PHCC’s consultant would be contractually bound by a protective agreement Northern may require the consultant to sign. Moreover, violations of protective orders may subject the

¹ Both PHCC and the Public Advocate argued that since Spring Ice and Oil does not provide the services at issue in the case, there is no basis for a finding that Mr. Bradley had an interest that could be benefited by access to the information. According to their argument, Spring Ice and Oil is no more likely to provide these services in the future than any other entity. The Examiner does not agree with this blanket statement. Information provided to date in this case indicates that oil dealers often do provide the services at issue in this case. In fact, the Examiner’s January 11, 2000 Order was based on the assumption that Mr. Bradley had a direct, substantial financial interest in Spring Ice and Oil and that this was the type of interest that *could* be benefited by access to the information if the business expanded to provide these services. Further information has shown that Mr. Bradley’s financial interest in Spring Ice and Oil is not substantial.

violator to sanctions by the Commission. See, 35-A M.R.S.A. § 1502. Finally, the statute envisions that consultants should be provided with confidential information unless there is a compelling reason to restrict access to the consultant. 35-A M.R.S.A. § 1311-A (1)(E). Northern has not established any such compelling reason.

Accordingly, it is

ORDERED

1. That until further order, confidential and proprietary information to be produced by Northern relating to or discussing:
 - (a) revenues and profits from Northern's non-core activities;
 - (b) the number of customers for certain potential non-core customers and the number of service calls;
 - (c) Northern's assessment of the potential for future growth for certain potential non-core activities;
 - (d) The assessment of Northern employees of the impact of non-core activities on the employees' responsibilities.

shall be considered "Designated Confidential Information" for purposes of this Temporary Order and access to and use of Designated Confidential Information shall be limited as described in Paragraph 4 below.

2. That until further order, all Designated Confidential Information be and remain confidential. Designated Confidential Information shall not be disclosed for any purpose other than the purposes of this proceeding, and then solely in accordance with this Temporary Order. No person to whom access to Designated Confidential Information is accorded pursuant to paragraph 3 of this Temporary Order shall: disclose or reveal, directly or indirectly, the content of the Designated Confidential Information to others, except as provided in paragraph 3.
3. That until further order, access to Confidential Information shall be limited to (i) Commission members and counsel; (ii) the Public Advocate and counsel; (iii) counsel, employees, independent consultants or experts retained by the Commission (including both advisory and advocacy staff) or the Public Advocate in connection with this proceeding; (iv) counsel for the Plumbing Heating and Cooling Contractors (PHCC); (v) independent consultants or experts of PHCC; a stenographer or reporter recording any hearing in connection with this proceeding; and (vi) counsel for, or any other representative of Northern. Further, that all parties, and representatives of parties that are provided access

to Confidential Information may not use the information for any purpose other than the consideration of issues in this proceeding and that Mr. Bradley (counsel for PHCC) notify the Commission and parties to this proceeding if he makes any direct investment in an entity that provides the services at issue in this case or if any entity in which he has a direct investment provides such services. This notice requirement expires three years from the date of this order.

4. That all materials claimed by Northern to be Designated Confidential Information under the terms of this Temporary Order shall be clearly marked "Confidential" by Northern. In the case of documents, each page of any such document shall be stamped "Confidential" in bold lettering in the upper right hand corner of each page including the cover letter. Any document or portion thereof not clearly and conspicuously marked "Confidential" in bold lettering shall not be protected under the terms of this Temporary Order. Faxed materials should be marked as any other document. With regard to other media, diskettes should be marked "Confidential" on the outside and, to the extent possible, each file on the diskette should be similarly identified. Any person or party subject to the terms of this Temporary Order who receives unmarked documents or materials which he/she believes Northern intended to be protected by the terms of this Temporary Order, and that would have been protected if marked in accordance with this paragraph, shall make a good faith effort to notify Northern of this fact and to avoid use of such documents or materials in a manner inconsistent with protection of such material under this Temporary Order.
5. That no copies of Designated Confidential Information furnished by Northern shall be circulated to persons other than those persons who are authorized under Paragraph 3 of this Temporary order to obtain Designated Confidential Information. Documents offered in evidence may be copied as necessary for that purpose. Persons authorized under Paragraph 3 hereof also may take such notes as may be necessary solely for the purposes of this proceeding. Those notes shall also be treated as Designated Confidential Information.
6. That the restrictions upon, and obligations accruing to, persons who become subject to this Temporary Order shall not apply to any Designated Confidential Information submitted in accordance with Paragraph 1 of this Temporary Order if the Commission rules, after reasonable notice and hearing, that the Designated Confidential Information was publicly known at the time it was furnished or has since become publicly known through no fault of the receiving party.
7. That where reference to Designated Confidential Information is required in pleadings, briefs, other legal documents, or argument, that reference shall be by citation of title or exhibit number only or by some other non-confidential description to the extent possible. In those circumstances, counsel shall make every reasonable effort to preserve the confidentiality of material in the sealed record. If counsel shall include Designated Confidential Information in pleadings, briefs, other legal documents, or arguments, that portion of the documents or that

portion of the transcript of the argument containing Designated Confidential Information shall be maintained under seal.

8. That the Commission may draw upon all Designated Confidential Information in the record in the deliberation of any decision or order that it may issue, but the Commission will avoid the reproduction in its decision of any Designated Confidential Information.
9. That should any appeal of, or other challenge to, the Commission's decision in this proceeding be taken, any portions of the record that have been sealed in accordance with Paragraph 13 shall be forwarded to the courts of this State in accordance with applicable law and procedures, but under seal and so designated in writing for the information of the court.
10. That this Temporary Order does not preclude any party from (a) objecting under the Maine Rules of Evidence to the admissibility of any Designated Confidential Information produced by Northern or (b) objecting, on any substantive or procedural ground, to any subsequent data request or other request for information.
11. That Northern may, at its option, provide to each person (other than the Commissioners or Commission Staff) having access to Designated Confidential Information a copy of this Temporary Order and require each person to agree in writing to the terms hereof prior to obtaining access to the Designated Confidential Information.
12. That Designated Confidential Information furnished by Northern pursuant to this Temporary Order and made part of the record in any proceeding before the Commission shall remain in the possession of the Commission, under seal, and subject to the protective requirements of this Temporary Order, until this Commission or its authorized presiding officer shall otherwise order.
13. Copies of Designated Confidential Business Information and documents, notes and other materials containing or reflecting, directly or indirectly, the Designated Confidential Business Information, that are in the possession of Commission members, counsel or employees (including both advisory and advocacy staffs) of the Commission may be retained by those persons for the purpose of performing those persons' duties and obligations. If retained, the Designated Confidential Information shall be subject to this Protective Order or to a protective order issued in another proceeding in which the Designated Confidential Information is used. If a Commission member, counsel or employee of the Commission does not retain the Designated Confidential Information, that person shall destroy it as provided in this paragraph. Within 40 days after the Commission reaches a final decision (i.e., unappealable) in this proceeding, each other party and Commission independent consultants and experts retained by the Commission to whom Designated Confidential Business Information has been made available

shall destroy all documents, notes and other materials containing or reflecting, directly or indirectly, the Designated Confidential Business Information. Audio, video or other such magnetically recorded materials shall be electronically erased before disposal. Documents shall be shredded.

Dated at Augusta, Maine, this 28th day of January, 2000.

BY ORDER OF THE HEARING EXAMINER

Lisa C. Fink